

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NO. 387

ENSLEY BANK AND TRUST COMPANY,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER

I

The brief filed for the United States does not deny petitioner's statement that "counsel for the United States did not at any time (in the courts below) raise the issue of ascertainment" (Brief for Petitioner, p. 13), except by an ambiguous quotation from the Government's brief in the Circuit Court of Appeals. (Brief for the United States, p. 12). That quotation as made is incomplete. The entire statement made in the Government's brief in the Circuit Court of Appeals follows:

"Here there was no abuse in the Commissioner's discretion because there was no showing that the debt was recoverable only in part. The evidence below does not establish that the debts were in fact uncollectible. Here taxpayer acquired by an outright sale and transfer a valuable line of deposits, the name of National and the good will of the latter and became the sole and dominant factor in the banking business in the Ensley District. (R. 97). *The trial court held that under the*

contract taxpayer paid National for this good will, the difference between the reasonable value of the assets pledged by National and the amount of indebtedness assumed by taxpayer. The good will was clearly considered by all parties as an item of value. National had an established business at the time. When times were good its deposits ran as high as \$1,250,000. (R. 97). There was undoubtedly value to its name and bank location as well as its depositors' lists. First National Bank of Birmingham took over taxpayer's deposit liabilities in consideration of the good will and paid cash in addition thereto. (R. 98). The value or lack of value of this good will is not shown by the testimony of Holcomb, manager of one of taxpayer's branch banks that the deposits could not be sold in 1932. (R. 126). Good will is an element of value which inheres in the fixed and favorable consideration of customers arising from an established and well known and conducted business. While Mr. Holcomb was familiar with the affairs of the bank he did not pose as an expert on good will valuation. There is no evidence that he ever appraised good will as an expert or ever took into consideration all elements required in making an appraisal of such items. Here the good will had a value that could only be measured over the years by taking into consideration the history of the business and weighing the good years along with the bad.

*"The trial court held that the value of the good will was not shown and was immaterial, the material question being what taxpayer agreed to pay for the same. The taxpayer paid for this good will the difference between the amount of liabilities assumed and the amounts realized and collected on liquidation. (R. 106, 109)."**

*Emphasis added. Citations omitted.

II

The brief filed for the United States refers to the denial made in the amendment to defendant's answer as filed in the District Court. But that denial is of the taxpayer's assertion that taxpayer did not ascertain a loss *prior to or at*

the time of its assumption of the liabilities of National Bank. (R. p. 3). When that denial is read in the light of the Government's specific averment that a loss *had* been ascertained prior to the year 1933, it becomes obvious now, as it was obvious during the trial in the District Court, that the only issue litigated was the issue as to good will. In other words, the complaint filed by petitioner in the District Court alleges both (a) that there was *no* ascertainment of loss as of August 19, 1932; and (b) that there *was* an ascertainment during 1933. The Government's answer as amended, denies that there was no ascertainment as of August 19, 1932, and specifically avers that there had been an ascertainment of loss prior to 1933. In order to sustain its position as to good will, it was necessary for the Government to assert that a loss was ascertained by petitioner on August 19, 1932, the date of the take-over.

III

The brief filed for the United States refers to the examination of witnesses by counsel for taxpayer in the District Court as establishing that ascertainment was an issue in that court. (Brief for United States, pp. 15-16). But, taken in their context, the questions referred to demonstrate that both counsel were directing their examination exclusively to the good will issue. The cross-examination of the witnesses by counsel for respondent in the District Court, to which the respondent so refers, all was directed, not to the years 1933 and 1934, but to the situation on August 18, 1932. That cross-examination shows that the petitioner's evidence as to ascertainment (referred to in respondent's brief at pages 15-16), was accepted by counsel for respondent, who undertook to demonstrate that the petitioner ascertained a loss not only in later years, but also as early as 1932. The question whether the 1932 transaction created a debtor-creditor relation between petitioner and Na-

tional Bank, or resulted in the acquisition of a capital asset is the only question with respect to which that line of cross-examination was relevant, and is the only question upon which it was offered. The taxpayer relied on the Government's specific assertion that a loss was ascertained prior to the year 1933, and based its entire case on a mathematically demonstrable increase in that loss during the years 1933 and 1934. Such reliance was not merely justifiable; there was no other issue available to either party in view of the pleadings.

IV

The brief for the United States points to no pleading of respondent, and to no argument made in brief or orally by counsel for respondent, respecting an issue as to ascertainment. The only issue raised, and the only issue considered by the District Court or by counsel was the issue as to good will. The Circuit Court of Appeals obviously departed from the accepted and usual course of judicial proceedings in considering any other issue. The case demands a further review in this Court.

Respectfully submitted,

B. A. MONAGHAN,
Birmingham, Alabama
Attorney for Petitioner

LEE C. BRADLEY, JR.
WHITE, BRADLEY, ARANT & ALL
Birmingham, Alabama
Of Counsel

